Bank Islam Malaysia Bhd v Sunwai Trading Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22A-517 OF 2010
ZAWAWI SALLEH J
7 JANUARY 2013

Banking — Banker and customer — Summary judgment — Bank obtained summary judgment against first defendant in respect of default — Order stayed until first defendant's counterclaim for wrongfully freezing its account — Whether plaintiff was authorised to freeze first defendant's account

The first defendant had been granted three Islamic banking facilities for the purpose of its import and export business. When the first defendant failed to make payments on the banking facilities by the respective maturity dates, the plaintiff issued a notice of default dated 28 January 2010 ('the notice') suspending the first defendant's banking facilities. The plaintiff was granted summary judgment against the defendants in respect of the notice and default. However, the order was stayed until the first defendant's counterclaim. In the counterclaim, the first defendant had contended that the plaintiff had wrongfully frozen the first defendant's banking facilities based on an email dated 15 January 2010 ('the email'), which had been sent to a number of the plaintiff's employees. The first defendant argued that by freezing the account on 15 January 2010, the plaintiff had acted outside the ambit of the facilities agreement and that it was fully responsible for the loss and damages suffered by the defendant, namely its inability to utilise the facilities granted to it to proceed with the contracts it had entered into with suppliers. In answer to this claim, the plaintiff submitted that the email was merely an internal instruction by the plaintiff to its relevant officers and that it was not an effective notice of suspension of the facilities granted to the first defendant. As such, it was the plaintiff's defence to the counterclaim that the first defendant had no right to rely on the email as a basis of its counterclaim. The plaintiff also claimed that the first defendant's account was frozen because of some suspicious invoices submitted to the plaintiff bank.

Held, allowing the first defendant's counterclaim with costs fixed at RM5,000:

(1) Based on the available evidence it was clear that the first defendant's account was frozen on 15 January 2010 because of the email dated 15 January 2010, regardless of whether it was an internal, external, temporary or permanent freeze (see para 17).

(2) Since there was no evidence put forth by the plaintiff relating to the purported suspicious invoices that formed the basis of the freezing of the

first defendant's account, the only conclusion that could be made was that there were no suspicious invoices at all. As such the first defendant had established its counterclaim against the plaintiff on a balance of probabilities (see paraS 21–22).

(3) With regard to the claim for damages, the first defendant was only entitled to an award of nominal damages at RM5,000 for want of proof (see para 23).

[Bahasa Malaysia summary

Defendan pertama telah diberikan tiga kemudahan perbankan Islam untuk tujuan perniagaan import dan eksportnya. Apabila defendan pertama gagal untuk membuat pembayaran ke atas kemudahan perbankannya pada tarikh matang masing-masing, plaintif mengeluarkan notis keingkaran bertarikh 28 Januari 2010 ('notis') menggantung kemudahan perbankan defendan pertama. Plaintif diberikan penghakiman ringkas terhadap defendan-defendan berkaitan notis dan keingkaran. Perintah tersebut walau bagaimanapun ditangguh sehingga tuntutan balas defendan pertama. Di dalam tuntutan balas, defendan pertama telah berhujah bahawa plaintif telah secara salah membekukan kemudahan perbankan defendan pertama berdasarkan emel bertarikh 15 Januari 2010 ('emel'), yang dihantar kepada beberapa pekerja plaintif. Defendan pertama berhujah bahawa dengan membekukan akaun pada 15 Januari 2010, plaintif telah bertindak di luar lingkungan perjanjian kemudahan dan ia bertanggungjawab sepenuhnya untuk kerugian dan ganti rugi yang dialami oleh defendan, terutamanya ketidakupayaannya untuk menggunakan kemudahan yang diberikan kepadanya untuk meneruskan dengan kontrak-kontrak yang dimasukinya dengan pembekal-pembekal. Dalam menjawab kepada tuntutan ini, plaintif berhujah bahawa emel tersebut hanya arahan oleh plaintif kepada pegawai-pegawai relevan dan bahawa ia bukan notis penggantungan kemudahan yang berkesan yang diberikan kepada defendan pertama. Dengan itu, adalah pembelaan plaintif kepada tuntutan balas bahawa defendan pertama tidak mempunyai hak untuk bergantung ke atas emel sebagai asas tuntutan balasnya. Plaintif juga menuntut bahawa akaun defendan pertama dibekukan kerana beberapa invois yang meragukan diserahkan kepada plaintif.

Diputuskan, membenarkan tuntutan balas defendan pertama dengan kos ditetapkan pada RM5,000:

(1) Berdasarkan keterangan yang sedia ada adalah jelas bahawa akaun defendan pertama dibekukan pada 15 Januari 2010 disebabkan emel bertarikh 15 Januari 2010, tanpa menghiraukan sama ada ia adalah pembekuan dalaman, luaran, sementara atau kekal (lihat perenggan 17).

(2) Memandangkan tidak terdapat keterangan yang dikemukakan oleh plaintif berkaitan invois yang meragukan tersebut yang membentuk asas

pembekuan akaun defendan pertama, satu-satunya kesimpulan yang boleh dibuat adalah bahawa tidak langsung terdapat invois yang meragukan. Dengan itu defendan pertama telah membuktikan tuntutan balasnya terhadap plaintif atas imbangan kebarangkalian (lihat perenggan 21–22).

(3) Berkenaan tuntutan untuk ganti rugi, defendan pertama hanya berhak kepada award ganti rugi nominal sebanyak RM5,000 untuk kehendak bukti (lihat perenggan 23).]

Legislation referred to

Rules of the High Court 1980 O 14

Mohd Zein bin Md Tajuddin (Noraishah bt Azis with him) (Md Tajuddin & Co) for the plaintiff.

Syahredzan Johan (Melissa Sasidaran with him) (RamRais & Partners) for the defendants.

Zawawi Salleh J:

INTRODUCTION

[1] In this case, the court had granted the plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980 on 26 July 2012. The order was stayed until the disposal of the first defendant's counterclaim.

[2] The counterclaim was heard on 9–10 October 2012, with two witnesses from each party.

[3] For the reasons given below, the court found that the claims against the plaintiff for damages failed for want of proof. However, as the liability had been proven, the first defendant was entitled to nominal damages in the amount of RM5,000, with costs fixed at the same amount.

FACTUAL BACKGROUND

[4] There were three Islamic banking facilities granted to the first defendant:

(a) *Murabahah* Working Capital ('MWCF') for the amount not exceeding RM1m only;

(b) Domestic Bills of Exchange Purchase ('DBEP-i') for the amount not exceeding RM4m only; and

(c) Accepted Bills-i (Sales) ('AB-i') for the amount not exceeding RM7m only and Cash Line-i ('CL-i') for the amount of RM500,000 only.

THE FACILITIES

[5] The facilities were for the purpose of the import and export business of sports goods which was the lifeblood of the first defendant's company.

[6] The first defendant contended that the plaintiff had wrongfully frozen the facilities on 15 January 2010 based on the email sent by DW2 to a number of employees of the plaintiff (see Tab 20 common bundle of documents no 1) ('email dated 15 January 2010'). For convenience, I reproduce below the excerpt of the email:

> Assalamualaikum wbt
>
> Arising from the FCA meeting this morning, please freeze the above client's facilities.
>
> Please act accordingly particularly to tag the decision in our system and L/O (Trade Ops).
>
> Wassalam.

[7] According to PW1, he came to know about the freezing when the invoice sent to the plaintiff on the even date was not paid. PW1 testified as follows:

> S En Koh, tadi bila peguam tanya pasal sama ada, ada hantar invois untuk kemudahan pertama pada 15 hingga 28 Januari 2010, you kata ada nak terangkan bahawa pada 15 Januari 2012 you kata ada hantar invois, sekarang ni 15 Januari 2010 you ada hantar atau tidak invois?
>
> J 15 Januari 2010, saya ada hantar satu invois pada Bank Islam tapi lepas itu sampai petang, dia tak masuk-masuk dekat saya punya akaun. So, saya punya lori sudah sampai supplier punya tempat dan tak boleh angkat itu barang because itu bank belum masuk itu payment. So, saya telefon En. Akhil, Bank Islam officer. Dia cakap ini invois tak boleh kasi bayar. So, bila saya tanya apa hal dia pun tiada cakap. Cuma dia cakap sama saya dia orang akan buat meeting after pukul 2 dan beritahu saya boleh atau tidak boleh. Sampai pukul 4, saya call dia, saya cakap taka pa. Itu invois kalau tak boleh buat, you pulang balik pada saya because saya bayar sendiri pun tak apa kalau bank tak mahu finance. Dia cakap itu invois tak boleh hantar you balik and kena letak sama itu bank. Second day, saya dapat telefon dari Ustaz dan dia suruh saya pergi meeting untuk beku akaun punya hal pasal 15 Januari 2010 dia terus beku saya punya akaun.

[8] It was the first defendant's position that by freezing the account on 15

January 2010, the plaintiff, in fact, had acted outside of the ambit of the facilities agreement. Therefore, it was asserted that the plaintiff was fully responsible for the loss and damages suffered by the first defendant.

[9] With that in hand, the first defendant claimed for:

(a) damages at RM25,000,000 for breach of contract and the bank's duties to the customer;

(b) damages at RM1,500,000 for loss of profit;

(c) damages for loss of contracts;

(d) exemplary and aggravated damages;

(e) costs of the action at RM350,000;

(f) interest at 8%pa calculated from 3 May 2010 until the date of full settlement of the judgment sum; and

(g) any other necessary relief.

[10] In answer to the above claim, the plaintiff, through the testimony of DW2, emphasised that the email dated 15 January 2010 was merely an internal instruction of the plaintiff to its relevant officers. It was not meant for the first defendant. It was not even intended to be an official suspension. That was why the email was not addressed to the first defendant.

[11] According to the plaintiff, the official suspension of the facilities only occurred vide the plaintiff's notice dated 28 January 2010 ('the notice') which was issued pursuant to cl 3.09 of the trade facilities agreement-trade facilities (see Tab 22 common bundle of documents no 1). The notice was given out as a result of the first defendant's failure to make payment on the following disbursements by its respective maturity dates:

Bill No	Due Date	Principal (RM)	Profit (RM)	Total Amount (RM)
5826090027	22 January 2010	230,000	4,237.98	234,837.98
5827090063	26 January 2010	365,816.85	6,183.15	372,000

[12] The following evidence was given by DW2 during the examination-in-chief and cross-examination in support of the plaintiff's case:

S Adakah tuan ingin menyatakan bahawa walaupun arahan dalaman tuan untuk membekukan Kemudahan-Kemudahan Defendan Pertama dikeluarkan pada 15.01.2010, Defendan Pertama masih lagi boleh

memohon untuk pengeluaran wang di bawah Kemudahan-Kemudahan Defendan Pertama selepas 15.1.2010 tetapi sehingga 27.1.2010 kerana notis pembekuan hanya telah dikeluarkan pada 28.1.2010.

J Ya

S Mengapa Defendan Pertama masih boleh memohon untuk pengeluaran wang di bawah Kemudahan-Kemudahan Defendan Pertama di antara tempoh 15.1.2010 sehingga 27.1.2010 tersebut?

J Ini kerana emel saya bertarikh 15.1.2010 tersebut tidak pernah dimajukan kepada Defendan Pertama. Ia adalah arahan dalaman. Jadi, tidak mungkin Defendan Pertama boleh mengatakan Kemudahan-Kemudahan Defendan Pertama telah dibekukan pada 15.1.2010.

…

S Jadi, pembekuan tu dah berlaku pada 15.1.2010, tetapi secara official dimaklumkan pada 28.1.2010. Setuju?

J Pada 15 haribulan itu dalaman sahaja.

S Jadi, berapa kali berlaku?

J Pada 15.1.2010 tu, pelanggan masih boleh digunakan kemudahan. 28.1.2010 pelanggan dah tak boleh menggunakan kemudahan. Jadi, pembekuan yang sebenarnya adalah pada 28.1.2010.

S Jadi, pembekuan dalaman ini apa maksudnya kalau pelanggan masih boleh kemudahan lagi?

J Maksudnya, kakitangan-kakitangan hendaklah berhati-hati memprosesnya dan hendaklah mendapat arahan daripada pihak atasan sebelum melepaskan pembayaran. Dalam operasi kita memang kita biasa guna perkataan beku. Kakitangan faham bahawa apa-apa processing hendaklah dapatkan arahan selanjutnya daripada pihak atasan. Kita tak nampak satu perkataan lain yang lebih efektif untuk menggambarkan.

[13] Based on the above, it was submitted on behalf of the plaintiff that the email dated 15 January 2010 was not an effective notice of suspension of the facilities against the first defendant. Therefore, the first defendant had no right to rely on it as a basis of its counterclaim. The plaintiff urged the court to dismiss the counterclaim with costs.

FINDINGS OF THE COURT

[14] This court is aware of the plaintiff's right under cl 3.09 of the trade facilities agreement-trade facilities to review, cancel and recall the facilities and the right can only be exercised upon demand. For convenience, I reproduce below the relevant provision of the clause:

Review Cancellation and No Obligation to Advance

Notwithstanding any other provision in this Agreement the facility granted herein shall be reviewed from time to time and at any time by the Bank and the Bank shall be entitled to review cancel and recall the Facility on demand. Nothing in these presents contained shall be deemed to render it obligatory upon the Bank either at law or in equity to make any advances or to afford any other accommodation or facility whatsoever to the Customer.

[15] The above right could be exercised by the plaintiff by the issuance of the notice due to the default on the part of the first defendant. This was undisputed. A judgment was duly obtained against the defendants in respect of the notice and default.

[16] However, in between the parties, the dispute was on the status of the email dated 15 January 2010. The email was said to have lead to the suspension of the payment for the invoice sent to the plaintiff on the same date. Meaning that, the first defendant was unable to utilise the facilities granted to it. As a consequence, the first defendant could not proceed with the contracts entered with its suppliers and the same was unable to make payments of the amount due under the facilities.

[17] The evidence made available before this court clearly showed that the first defendant's account was frozen on 15 January 2010 because of the email dated 15 January 2010, regardless of whether it was an internal, external, temporary or permanent freeze. PW2, who works for the plaintiff testified as follows:

S Dan dalam email ini ada juga dinyatakan bahawa akaun telah dibekukan? Betul?

J Ya, betul.

S Dan akaun ini dibekukan pada 15 Januari 2010? Betul?

J Ya, saya diberitahu. Kerana bila saya buka sistem, ada ditulis di situ akaun dibekukan pada 15 Januari 2010.

[18] The question then was: Whether the plaintiff was authorised to do so?

[19] According to DW1, the first defendant's account was frozen because of some suspicious invoices submitted to the bank. In support of the argument, the plaintiff, through DW1, had referred this court to the documents in Tab 16 of the common bundle of documents no 1. To my mind these documents are not relevant.

[20] The documents are in respect of the invoice dated 14 December 2009.

The invoice was duly paid by the plaintiff via confirmation of *Al- Murabahah* Working Capital Financing (Purchase) dated 15 December 2009. In this court's opinion, the plaintiff could not rely on these documents to defend its action. The one contended by the first defendant was the invoice sent to the plaintiff on 15 January 2010 and not the one dated 14 December 2009. Therefore, there was no evidence in support of the plaintiff assumption on this issue. For that, this court believes that the following testimony of DW1 is relevant:

> S Jadi, macam mana puan boleh katakan inilah invois yang kononnya dikatakan meragukan? Jadi, macam mana puan? Puan sendiri kata siasatan dilakukan sebelum issue surat. Tapi ini dah issue surat. Jadi, saya cadangkan bahawa sebenarnya invois-invois ini yang puan rujuk tadi sebenarnya invois yang memang telah diluluskan oleh pihak bank. Setuju atau tidak?
>
> J Saya silap sebab ini adalah pada 15 Disember 2009 di mana kes tiada masalah. Jadi, masa ini invois dia tiada masalah. Ini adalah invois yang betul, yang kita benarkan.
>
> S Jadi, berbalik kepada soalan saya yang asal, di mana dia di dalam dokumen-dokumen ini dikatakan invois yang meragukan?
>
> J Tiada di dalam dokumen ini.

[21] This court agreed with the submissions of learned counsel for the first defendant that since no evidence was put forth by the plaintiff relating to the purported suspicious invoices that formed the basis of the freezing of the first defendant's account, the only conclusion that can be made is that there are no suspicious invoices at all.

CONCLUSION

[22] Having considered the above facts, evidence and submissions by both parties, the court found that the first defendant had established its counterclaim against the plaintiff on a balance of probabilities, with costs fixed at RM5,000.

[23] With regard to the claim for damages, the first defendant was only entitled to an award of nominal damages at RM5,000 for want of proof. The first defendant put no evidence during the trial to qualify it damages; and in

such circumstances the court could not even form a basis of a speculative inference measuring the extent of its damages for loss of profit, loss of contract and exemplary and aggravated damages.

First defendant's counterclaim allowed with costs fixed at RM5,000.

Reported by Kohila Nesan